No. 90-1102

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT E. GIBSON,

Petitioner,

v.

THE FLORIDA BAR, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR DAVID P. FRANKEL AND JOSEPH W. LITTLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF FOR DAVID P. FRANKEL AND JOSEPH W. LITTLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

Amici curiae David P. Frankel and Joseph W. Little ("*Amici*") are active members of The Florida Bar (the "Bar"). *Amici* were admitted to practice law in Florida in 1980 and 1974 respectively and have been remitting their full compulsory annual dues to the Bar continuously since their admission.

For years *Amici* have protested, both formally and informally, the expenditure of their compulsory dues for purposes not germane to the Bar's core functions. Mr. Little was an *amicus* participant both in the proceedings below in the United States

Court of Appeals for the Eleventh Circuit and in *Keller v. State Bar*, 110 S. Ct. 2228 (1990).

In October 1990, Mr. Frankel filed an original Petition with the Supreme Court of Florida challenging several legislative positions adopted by the Bar. *Florida Bar Re David P. Frankel*, No. 76,853 (Fla. filed Oct. 29, 1990). While that proceeding is described more fully in the argument portion of this *amici curiae* brief, it questions the unlawful and unconstitutional use of compulsory bar dues for legislative lobbying. It also challenges a Bar rule that requires dissenting members to file objections to particular legislative positions adopted by the Bar. *See infra* Appendix ("App.") A. Mr. Little's motion to join in Mr. Frankel's Petition proceeding was granted by the Supreme Court of Florida. *See infra* App. B.

The Bar's Brief in Opposition to Petition for Writ of Certiorari (at page 10) has referred this Court to *Amici*'s pending Petition proceeding before the Supreme Court of Florida. That Brief also has referred this Court to an original Petition it filed with the Supreme Court of Florida seeking to amend the Bar's legislative lobbying rules. Since the filing of the Bar's Brief, the Supreme Court of Florida has promulgated the new rules almost verbatim. *See infra* App. E. *Amici* were respondents in that rule amendment proceeding, which is described more fully in the argument portion of this *amici curiae* brief.

On April 9, 1991, the Supreme Court of Florida heard oral argument on *Amici*'s Amended Petition and on *Amici*'s Motion for an Injunction Pendente Lite in that proceeding. No decision was rendered by the court before the date this *amici curiae* brief was submitted for printing.

SUMMARY OF ARGUMENT

The *Keller* decision limited the use of compulsory dues by integrated bars to those activities which are "justified by the State's interest in regulating the legal profession and improving the quality of legal services." Despite this clearly articulated constitutional standard, The Florida Bar continues to engage in conduct far beyond the bounds of permissible activity.

Amici initiated a proceeding before the Supreme Court of Florida which challenges eight specific lobbying positions taken by the Bar concerning children. Of relevance to the *Gibson* litigation, *Amici*'s Amended Petition challenges some of the criteria adopted by the Supreme Court of Florida to guide the Bar in determining whether it may use compulsory dues for certain activities. *Amici*'s Amended Petition also challenges a Bar rule that requires dissenters to identify specific Bar lobbying activities with which they disagree.

The Bar's response to *Amici*'s Amended Petition takes the extreme position that it may use compulsory dues to lobby on any issues "regardless of their scope" as long as dissenting Bar members are provided with the procedural safeguards set out in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986). This is a complete misreading of *Keller*, which established the outer bounds of constitutionally permissible compulsory bar activity. The Bar's position is also contrary to previous advice provided by its own Bar Counsel on the general subject of ideological activities.

The Bar's response to *Amici*'s Amended Petition further contends that the Bar can require dissenters to specify particular lobbying activities with which they disagree provided the Bar complies with the *Chicago Teachers* procedures. The Bar's argument is unsupported by the facts of *Chicago Teachers*, a case that simply did not raise or address the subject of general versus specific objections.

In its Brief in Opposition to Petition for Writ of Certiorari in this case, the Bar cited its petition with the Supreme Court of Florida for the proposition that this Court should allow Florida an adequate opportunity to review its rules in light of *Keller* prior to revisiting the issues raised therein. After the Bar's Brief was filed, the Supreme Court of Florida adopted almost verbatim the Bar's petition to amend its legislative lobbying rules. The amended rules increase the already substantial administrative and financial burdens placed upon dissenters who seek to exercise their first and fourteenth amendment rights. In addition, the amended rules do not resolve any of the issues Mr. Gibson has been litigating for seven years.

The decision of the Court of Appeals for the Eleventh Circuit should be vacated and the relief requested by Mr. Gibson should be granted.

ARGUMENT

I. *AMICI*'S PETITION BEFORE THE SUPREME COURT OF FLORIDA

Despite this Court's thoughtful articulation in *Keller* of a constitutional standard for compulsory bars to follow in the expenditure of member dues, The Florida Bar continues to spend dissenters' compulsory dues in violation of their first and fourteenth amendment rights. The Bar's refusal to adhere to the substantive constitutional limits stated in *Keller* demonstrates graphically why this Court should require the Bar to provide more effective procedural safeguards for dissenting members.

On June 4, 1990, this Court held unanimously that compulsory bars may use dissenters' dues only to fund activities of an ideological nature which are "justified by the State's interest in regulating the legal profession and improving the quality of legal services." *Keller*, 110 S. Ct. at 2236. Exactly four months later (on October 4, 1990), The Florida Bar's Board of Governors adopted legislative positions concerning seven subject areas

representing at least twenty-four specific issues. A cursory summary of these legislative positions was announced in an "Official Notice" in the Bar's twice-monthly publication. *See* Fla. Bar News, Oct. 15, 1990, at 4, col. 2 (*infra* App. A at 17a-19a).

Of the twenty-four specific issues adopted by the Board of Governors, fourteen concern children. The Board of Governors announced the Bar's support of the recommendations of The Florida Bar Commission for Children. *Amicus* Frankel promptly filed an original petition proceeding with the Supreme Court of Florida challenging the Bar's authority to use compulsory dues to support eight of the fourteen specific issues concerning children.[1]

The eight specific legislative positions challenged in *Amici*'s Petition, and later in their Amended Petition, are the Bar's support of: (a) expansion of the women, infants and children (WIC) program; (b) extension of Medicaid coverage for pregnant women; (c) full immunization of children; (d) establishing children's services councils; (e) family life and sex education/teen pregnancy prevention; (f) increasing Aid to Families with Dependent Children; (g) enhanced child-care funding and standards; and (h) creation of children's needs consensus estimating conference.

Amici's Amended Petition makes three arguments, two of which are relevant to the case *sub judice*. First, *Amici* argue that the Bar cannot sustain its burden of proof that the above-listed legislative positions satisfy the standards adopted by the Supreme Court of Florida in *Florida Bar Re Schwarz*, 552 So. 2d 1094, 1095 (Fla. 1989), *cert. denied*, 111 S. Ct. 371 (1990). This is essentially a state law argument and is therefore not directly relevant to the *Gibson* case. *See infra* App. A at 2a-8a.

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[1] On January 4, 1991, the Supreme Court of Florida granted *Amicus* Little's motion to join as a co-petitioner. *See infra* App. B at 27a. For convenience, the remainder of this *amici curiae* brief refers to the petition proceeding before the Supreme Court of Florida as though it had been filed by both *Amici* simultaneously.

Next, *Amici*'s Amended Petition maintains that the first and fourteenth amendment rights of dissenting Bar members to be free from compelled speech and association are violated by some of the criteria adopted by the Supreme Court of Florida in *Schwarz* to guide the Bar in determining whether it may use compulsory dues for certain activities. Specifically, *Amici* challenge the *Schwarz* criteria that authorize lobbying outside the core functions of the Bar where the following elements are met:

> (1) That the issue be recognized as being of great public interest;
>
> (2) that lawyers are especially suited by their training and experience to evaluate and explain the issue; and
>
> (3) the subject matter affects the rights of those likely to come into contact with the judicial system.

Schwarz, 552 So. 2d at 1095. In essence, *Amici* assert that application of the *Keller* standards demonstrates that these *Schwarz* criteria are unconstitutional both on their face and as applied to the eight enumerated legislative positions concerning children. *See infra* App. A at 8a-11a.

Finally, *Amici*'s Amended Petition contends that in accordance with this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209, 241 (1977), the Bar is required to recognize its members' general objections to the use of their compulsory dues to fund legislative lobbying activities and is further required to provide refunds based upon general objections. *See infra* App. A at 11a-14a.

II. THE BAR HAS ASSERTED INCORRECTLY THAT ITS AUTHORITY TO USE COMPULSORY DUES FOR LOBBYING IS VIRTUALLY UNLIMITED

Pursuant to an order of the Supreme Court of Florida, the Bar filed a response to *Amici*'s Amended Petition. *See infra* App. C at 28a-56a.[2] The Bar's response takes an extreme view of the limits of its constitutional authority to engage in ideological lobbying with its dissenting members' compulsory dues. The Bar states:

> The three *Schwarz II* criteria, if confirmed as pronouncements of The Florida Bar's range of corporate authority in the political arena, present absolutely no federal constitutional question, regardless of their scope, provided member dissent is accommodated consistent with *Chicago Teachers* for those issues advocated beyond *Keller*'s two core areas.

See infra App. C at 41a. In effect, the Bar is arguing that it may use compulsory dues to lobby on any issue, such as abortion, gun control or flag desecration, as long as dissenting Bar members are provided an adequate explanation of the basis of their compulsory dues, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending. *See Chicago Teachers*, 475 U.S. at 310.

Plainly, the Bar's argument is a complete misreading of *Keller* and is contrary to that decision. In fact, *Keller* represents the outer bounds of permissible use of compulsory dues. In a passage that is at direct odds with the Bar's argument, the Court declared: "[T]he extreme ends of the spectrum are clear. Compulsory dues may not be expended to endorse or advance a gun control or nuclear freeze initiative." *Keller*, 110 S. Ct. at 2237. The Court did not limit this conclusion by providing that compulsory dues could be so expended if the *Chicago Teachers* procedures were implemented.

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[2] Because the first argument *Amici* raise in their Amended Petition concerns proper interpretation of state law, the Bar's response to it is not summarized in this *amici curiae* brief. For the Bar's response on the state law issue, see *infra* App. C at 34a-39a.

The Bar's argument on this point is also contrary to the advice that the Bar's Counsel of Record in this case, Barry Richard, provided to Bar President James Miller on October 17, 1990. *See infra* App. D at 57a-60a. In that opinion, the Bar Counsel considered the applicability of the *Schwarz*, *Gibson*, and *Keller* decisions to a proposal that the Bar boycott a community to show support for the welfare of minority groups there. Bar Counsel Richard stated:

> The [*Keller*] Court held that a bar cannot spend compulsory dues over a member's objections for ideological activities not germane to the purposes for which compelled association is justified. The Court found that purpose to be "regulating the legal profession and improving the quality of legal services."
>
> . . . .
>
> The essence of all of the foregoing cases is that The Florida Bar is not a general social action association with the freedom to engage in any activity it chooses. There are voluntary bar associations at the local and national levels which do have that freedom. The Florida Bar does not. It derives its power to compel membership from a very circumscribed purpose and it is limited in its pursuits to fulfilling that purpose.

The Bar Counsel's advice was not circumscribed by whether the *Chicago Teachers* procedures were available. Indeed, the *Chicago Teachers* decision is not mentioned in the opinion letter. *Amici* assert that the Bar must apply a similarly narrow construction of the same cases to the lobbying positions challenged in their Amended Petition and by Mr. Gibson. The only principle the Bar appears capable of articulating is that it can use compulsory dues for lobbying whenever it wants to.

III. THE BAR'S ASSERTION THAT IT MAY REQUIRE DISSENTING MEMBERS TO SUBMIT OBJECTIONS TO SPECIFIC ISSUES IS CONTRARY TO CLEAR PRECEDENT OF THIS COURT

The Bar's response also purports to address the issue of general versus specific objections to legislative activities. The Bar contends as follows:

> Prior to the holding in *Chicago Teachers* that a union's collection of proportionate share payments must include "an adequate explanation of the basis for the fee," it was quite logical for the *Abood* Court to have been sensitive to a dissident's difficulty in identifying "the specific expenditures" [97 S.Ct. at 1802] for possible objection, and in monitoring "all the numerous and shifting expenditures" [97 S.Ct. at 1803] that a union might incur. Now, however, a member objection procedure which comports with *Chicago Teachers* should vitiate that argument—especially when the formal notice provisions of that procedure include specificity as to contestable matters and substantially reduce any burden of monitoring the organization's political activities.

See infra App. C at 42a. The Bar appears to be arguing that it may require dissenters to specify particular lobbying activities with which they disagree provided the Bar complies with the *Chicago Teachers* procedures. If this is what the Bar is arguing, this Court has supplied no support for it in the *Chicago Teachers* decision. Indeed, prior to initiating litigation, some of the *Chicago Teachers* plaintiffs had made specific objections; some had made only general objections; and some had made no objections at all. However, *all* were ultimately granted the same relief on federal constitutional grounds. The subject of general versus specific objections was simply not an issue in the *Chicago Teachers* case.

IV. THE BAR'S RECENTLY AMENDED LEGISLATIVE LOBBYING RULES EXACERBATE THE CONSTITUTIONAL INFIRMITIES AT ISSUE IN THE *GIBSON* CASE

On March 26, 1991, the Supreme Court of Florida amended the rules impacting on the Bar's legislative lobbying program. The amendments increase the already substantial administrative and financial burdens placed upon dissenters who seek to exercise their first and fourteenth amendment rights.

The amendments may be summarized as follows. First, the amended rules attempt to maintain the confidentiality of members filing particular objections. *See infra* App. E, Amended Rule 2-3.10 and 2-9.3(c). Second, they provide successful dissenters with the statutory rate of interest on judgments for their refunds from the date their dues were received by the Bar. *See id.* Amended Rule 2-9.3(c)(3), (e)(4). Third, in the event a dissenter's objection is referred to arbitration, they establish venue in Leon County, Florida unless otherwise determined by a majority of the arbitration panel. *See id.* Amended Rule 2-9.3(e). Fourth, they clarify that the Bar must prove by the greater weight of the evidence that the legislative matters at issue are constitutionally justified. *See id.* Fifth, they place on nonprevailing parties in arbitration proceedings, the burden of compensating all three arbitrators (to be paid at an hourly rate equal to that of a circuit court judge).[3] *See id.* Amended Rule 2-9.3(e)(5)-(6). Sixth, they exclude from the Bar's expenses for its legislative activities the costs of any arbitration proceeding. *See id.* Amended Rule 2-9.3(e)(7).

Two aspects of these rule amendments are particularly chilling to dissenters. First, the amendment that establishes venue for arbitration proceedings in Leon County, Florida unless otherwise determined by a majority of the panel could force dissenters to travel hundreds (or even thousands) of miles to

[3] The rule amendment is unclear on whether nonprevailing parties also have to compensate the prevailing party for its legal fees and costs.

present their case. For example, as an active Bar member who resides and works in Washington, D.C., *amicus* Frankel could be required to travel to Tallahassee, Florida to present or participate in his case.

Second, the amendment places on nonprevailing parties in all arbitration proceedings, the substantial cost of compensating all three arbitrators. Depending upon the complexity of the arbitration, this could result in the assessment of thousands of dollars. Since the specific lobbying activity a dissenter challenges will constitute only a small portion of the annual dues of $190.00, the potential benefits to be gained from a successful arbitration will be greatly outweighed by the potential costs of an adverse decision. In this regard, it should be noted that both before and after the amendments, the rules provide that the arbitration panel's decision is binding on both the dissenting member and the Bar. *See* Fla. Stat. Ann., vol. 35, Rule 2-9.3(e)(2) of the Rules Regulating The Florida Bar (West Supp. 1991). *But see Chicago Teachers*, 475 U.S. at 308 n.21 ("The arbitrator's decision would not receive preclusive effect in any subsequent [42 U.S.C.] § 1983 action.").

Thus, the amendments add significantly to the administrative and financial burden of dissenters who wish to challenge the Bar's lobbying activities. Dissenters will be effectively chilled from exercising their fundamental first and fourteenth amendment rights.

In addition, even though the Supreme Court of Florida adopted almost verbatim the Bar's rule amendment petition, the amended rules do not resolve any of the issues Mr. Gibson has been litigating for seven years. The Bar still is not required by its rules to: implement an advance reduction; provide advance notice of dues to be used for non-germane activities; accept general objections to its lobbying activities; and provide Mr. Gibson with a refund for past unconstitutional expenditure of his compulsory dues.

CONCLUSION

By ignoring clear precedent of this Court and erecting significant barriers before those wishing to exercise their fundamental first and fourteenth amendment rights, The Florida Bar treats its dissenting members with disdain. The fact that such unlawful treatment comes from an organization whose Oath of Admission requires its members to solemnly swear to "support the Constitution of the United States" is more than ironic.

Amici and others have made numerous unsuccessful attempts short of litigation to convince the Bar to abide by the law. Apparently, the Bar is more concerned with the potential loss of revenue and authority that may accrue from these proceedings than it is with protecting the constitutional rights of its members.

The decision of the Court of Appeals for the Eleventh Circuit should be vacated and the relief requested by Mr. Gibson should be granted.

Respectfully submitted,

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April 1991

APPENDICES

APPENDIX A

AMENDED PETITION OF DAVID P. FRANKEL FILED ON NOVEMBER 5, 1990

Florida Bar Re David P. Frankel,
No. 76,853 (Fla. filed Oct. 29, 1990)

IN THE
SUPREME COURT OF FLORIDA

THE FLORIDA BAR

CASE NO. 76,853

Re David P. Frankel

INTRODUCTION TO AMENDED PETITION

PETITIONER, David P. Frankel, Esquire, is an active member in good standing of The Florida Bar.[1] PETITIONER submits this Amended Petition because he questions the propriety of eight recommendations pertaining to a legislative position adopted by the Board of Governors (the "Board") of The Florida Bar during its meeting of October 4, 1990 and officially noticed to the Bar membership in the October 15, 1990 issue of The Florida Bar News.[2]

PETITIONER comes before the Supreme Court of Florida, in accordance with this Court's statement in The Florida Bar re Schwarz, 552 So.2d 1094, 1097 (Fla. 1989) (hereinafter "Schwarz"), that "any member of The Florida Bar in good standing may question the propriety of any legislative position

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[1] While PETITIONER is an attorney with the Federal Trade Commission ("FTC"), he is pursuing this Amended Petition solely as a member of The Florida Bar and not in his capacity as an attorney with the FTC. Therefore, the views expressed in this Amended Petition are solely the PETITIONER's and do not represent those of the FTC.

[2] This Amended Petition would have been submitted sooner, but because The Florida Bar membership records department had altered PETITIONER's mailing address on its own, without notice to PETITIONER, PETITIONER did not receive his copy of the October 15, 1990 issue of The Florida Bar News until October 23, 1990. PETITIONER has taken steps to correct this error for the future.

taken by the Board of Governors by filing a timely petition with this Court." PETITIONER, as set forth more fully below, petitions this Court for a declaration that the eight recommendations pertaining to the legislative position discussed in this Amended Petition are improper when considered against the standards adopted by this Court in Schwarz. Petitioner further petitions this Court for a declaration that the "additional criteria" adopted in Schwarz are violative of the First and Fourteenth Amendments to the United States Constitution, both by their express language and as applied. PETITIONER further petitions this Court to issue an order enjoining The Florida Bar, both pendente lite and thereafter, from engaging in any lobbying activities pertaining to the eight recommendations discussed in this Amended Petition, as well as any lobbying activities not clearly within the five subject areas recognized by the Court in Schwarz as clearly justifying legislative activities by the Bar. Finally, PETITIONER urges the Court to order The Florida Bar to recognize general objections made by Bar members who object to the Bar's spending any portion of their compulsory Bar dues on legislative lobbying activities or amicus brief filings.

THE FLORIDA BAR CANNOT SUSTAIN ITS BURDEN OF PROOF THAT THE LEGISLATIVE POSITIONS AT ISSUE SATISFY THE STANDARDS ADOPTED BY THE SUPREME COURT OF FLORIDA IN SCHWARZ.

The October 15, 1990 issue of The Florida Bar News at page 4 contains an "Official Notice" under the heading "Legislative positions adopted" which notifies Bar members that the Board of Governors adopted seven legislative positions during its meeting of October 4, 1990. A copy of the Official Notice is attached as Appendix A. One of those seven adopted positions—number 6—concerns the Board's decision to support fourteen recommendations of The Florida Bar Commission for Children relating to:

a. Expansion of the women, infants and children (WIC) program.

b. Extension of Medicaid coverage for pregnant women.

c. Full immunization of children.

d. Establishing children's services councils.

e. Family life and sex education/teen pregnancy prevention.

f. Increasing Aid to Families with Dependent Children.

g. Enhanced child-care funding and standards.

h. Creation of children's needs consensus estimating conference.

i. Establish child-care funding and standards.

j. Termination of parental rights/revision of Chapter 39, F.S.; cocaine-exposed infants.

k. Guardians Ad Litem-dissolution and custody.

l. Establish foster care review boards.

m. Eliminate select public disclosure exemptions in child abuse cases.

n. Development of juvenile offender rehabilitation and treatment programs.

Of these fourteen recommendations, only the final six (items 6.i. through 6.n.) colorably satisfy the Schwarz standards, and even some of these six probably fail the test. The descriptions of these six recommendations are too vague to determine whether they satisfy the Schwarz standards.[3]

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[3] Rather than complicate this Amended Petition with arguments over whether the final six recommendations of The Florida Bar Commission for Children meet the Schwarz standards, PETITIONER will concede, for purposes of this Amended Petition only, that recommendations 6(i) through 6(n) comport with the Schwarz standards. PETITIONER further notes, however, that it is the Bar that bears the burden of proof on all legislative lobbying positions and

In Schwarz, this Court expressly "approve[d] the recommendations of the Judicial Council [of Florida] and adopted them as guidelines to be followed with respect to determining the scope of permissible lobbying activities of The Florida Bar." Id. at 1098. Thus, these are the standards this Court must apply to test recommendations 6.a. through 6.h. at issue in this Amended Petition. Moreover, as the Court made clear in Schwarz, it is the Bar that "carries the burden of proof" that its legislative lobbying activities comport with the Schwarz standards. See id. at 1098; accord Gibson v. The Florida Bar, 798 F.2d 1564, 1569 (11th Cir. 1986) ("the Bar bears the burden of proving that its expenditures were constitutionally justified."). The Bar cannot carry that burden here.

The Judicial Council recommended, and the Schwarz Court adopted, that the following subject areas be recognized as clearly justifying legislative activities of the Bar:

> (1) Questions concerning the regulation and discipline of attorneys;
>
> (2) matters relating to the improvement of the functions of the courts, judicial efficacy and efficiency;
>
> (3) increasing the availability of legal services to society;
>
> (4) regulation of attorneys' client trust accounts; and

---

nothing contained in the Bar's Official Notice explains how these six recommendations comport with the Schwarz standards.

For example, it is possible, that recommendation 6.j. (concerning the termination of parental rights/revision of Chapter 39, F.S.; cocaine-exposed infants) may be designed to improve the functioning of the courts, judicial efficacy and efficiency. However, the report of The Florida Bar Commission for Children may express other, unrelated reasons for this recommendation that have nothing to do with judicial efficiency. The Official Notice contained in the Bar News does not provide any rationale for any of the fourteen recommendations.

> (5) the education, ethics, competence, integrity and regulation as a body, of the legal profession.

See id. at 1095.

The Judicial Council further recommended, and the Court adopted in Schwarz, that the following additional criteria be used to determine "the type of proposed legislative initiatives the Bar may become actively involved with when the legislation appears to fall outside of the above specifically-identified areas:"

> (1) That the issue be recognized as being of great public importance;
>
> (2) that lawyers are especially suited by their training and experience to evaluate and explain the issue; and
>
> (3) the subject matter affects the rights of those likely to come into contact with the judicial system.

See id.

None of the first eight recommendations of The Florida Bar Commission for Children, as adopted by the Board as legislative positions of the Bar (legislative positions 6.a. through 6.h.), meet the Schwarz standards. None of those eight recommendations concern: (1) "the regulation and discipline of attorneys"; (2) "matters relating to the improvement of the functions of the courts, judicial efficacy and efficiency"; (3) "increasing the availability of legal services to society"; (4) "regulation of attorneys' client trust accounts"; or (5) "the education, ethics, competence, integrity and regulation as a body, of the legal profession."

Rather than demonstrate in detail how each of the eight recommendations fails to meet the Schwarz standards, PETITIONER will apply those five standards to one of the eight recommendations for illustrative purposes only. Recommendation 6.c. pertains to full immunization for children, a subject that

has no relationship to the regulation and discipline of attorneys; that will not improve the functions of the courts, judicial efficacy and efficiency; that will not increase the availability of legal services to society; that has no bearing upon the regulation of attorneys' client trust accounts; and that has no bearing upon the education, ethics, competence, integrity and regulation as a body, of the legal profession. In any event, the Bar bears the burden of proof to demonstrate how such standards are met, which PETITIONER asserts the Bar cannot achieve.

Plainly, the Board cannot demonstrate that legislative positions 6.a. through 6.h. are subject areas "recognized as clearly justifying legislative activities by the Bar." Thus, the issue becomes whether legislative positions 6.a. through 6.h. are "recognized as being of great public interest," and "that lawyers are especially suited by their training and experience to evaluate and explain the issue," and that "the subject matter affects the rights of those likely to come into contact with the judicial system." Here, unlike the subject areas that are clearly justified as recognized area for legislative activities, the Bar must demonstrate that all three criteria are met. Once again, PETITIONER asserts that the Bar is unable to meet this burden.

While PETITIONER disagrees with such a broad reading of the "great public interest" criterion, he concedes, for purposes of the Amended Petition only, that legislative positions 6.a. through 6.h. may satisfy the first prong of the three prong standard.

The second prong of this standard, however, is clearly not met here for any of the eight legislative positions at issue. None of these positions pertain to issues "that lawyers are especially suited by their training and experience to evaluate and explain." To illustrate, PETITIONER turns again to legislative position 6.c.: "full immunization of children." PETITIONER asserts that few, if any, lawyers (responding as lawyers rather than as parents) could recite what types of immunization are available for children, at what cost, who pays for those immunizations, when they are to be provided, how frequently, and by whom. Moreover, PETITIONER is unaware of any subjects taught in law

school or in any Continuing Legal Education courses that train law students or practitioners on the subject; or of any subjects tested on the Florida Bar Examination that cover these issues. In short, lawyers have no special training and experience to evaluate and explain proper public policy on full immunization for children,[4] and have far less training and experience in this area than doctors and other allied health professionals, social workers, and public health officials.

The third prong of this Schwarz standard is also clearly not satisfied here. None of these issues affects the rights of those likely to come into contact with the judicial system. Although every person at some point in life may come into contact with the judicial system as a party, witness, juror, or court employee, such ordinary contact cannot be what the Court meant in the Schwarz criterion that the issues to be lobbied on "affect the rights of those likely to come into contact with the judicial system."

This Schwarz criterion must require some substantial nexus between: (1) the rights affected by the issue being lobbied on; and (2) the reason for the contact with the judicial system. Two illustrations here may be useful. If the Florida Legislature proposes to enact a statute that would require mandatory prison sentences for certain types of criminal offenses, the Bar should be able to meet its Schwarz burden of demonstrating that this will affect the rights of certain criminal defendants when they come into contact with the judicial system.

By contrast, a legislative proposal to require the public funding of full immunization for all children from tax revenues would affect the rights of children, but not with any relation to their contact with the judicial system. In short, to hold that Bar lobbying on full immunization for children meets this Schwarz criterion would be tantamount to holding that any proposed

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[4] If the Bar is permitted to lobby on "full immunization for children" what is to prevent it from lobbying on additional (or fewer) homeless shelters, additional (or less) maintenance of roads, additional (or fewer) parks, etc?

legislation affecting the rights of any group or individual would affect the rights of those who may at any time come into contact with the judicial system. Such an interpretation would render this Schwarz criterion a dead letter. The analysis applied here to the "full immunization for children" legislative position applies equally for the other legislative positions contained in 6.a. through 6.h.

In sum, the Bar cannot carry its burden of proof that legislative positions 6.a. through 6.h. fall within any of the five subject areas recognized in the Schwarz decision as clearly justifying legislative activities by the Bar. Similarly, the Bar cannot carry its burden of proof that these legislative positions fall within the additional criteria used to determine the type of proposed legislative initiatives the Bar may become actively involved with when the legislation appears to fall outside the five subject areas enumerated in the Schwarz decision. Thus, PETITIONER respectfully requests this Court to enjoin the Bar, both pendente lite and thereafter, from engaging in any lobbying on legislative positions 6.a. through 6.h.

THE THREE "ADDITIONAL CRITERIA" ADOPTED IN SCHWARZ VIOLATE THE FIRST AND FOURTEENTH AMENDMENT RIGHTS OF DISSENTING BAR MEMBERS TO BE FREE FROM COMPELLED SPEECH AND ASSOCIATION

The First Amendment to the United States Constitution provides that: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble . . . ." U.S. Const. amend. I. This language has been interpreted by the Supreme Court of the United States as protecting both the right to speak and to associate freely, as well as the right not to speak or associate. See, e.g., Abood v. Detroit Board of Education, 431 U.S. 209, 234-35 (1977).

The First Amendment is applicable to the states via the Fourteenth Amendment. See, e.g., DeJonge v. Oregon, 299 U.S. 353, 364 (1937); Gitlow v. New York, 268 U.S. 652, 666 (1925). The Florida Bar is "an official arm" of the Supreme Court of Florida and this Court has, by its rules, established "the authority and responsibilities" of the Bar. See Rules Regulating The Florida Bar, Ch. 1 (General Introduction). As an official arm of the State of Florida, The Florida Bar is bound by the First and Fourteenth Amendments. See Keller v. State Bar of California, 110 S. Ct. 2228 (1990).

In Abood, the Supreme Court of the United States applied the First and Fourteenth Amendments to a labor union that engaged in ideological activities with compulsory dues collected in part from non-union members. The Court held that a union cannot expend a dissenting individual's dues for ideological activities not "germane" to the purpose for which compelled association was justified. Abood, 431 U.S. at 222-23. In that case, the compelled association was justified only by the union's collective bargaining activities. Thus, any funds expended by the union for ideological activities not germane to collective bargaining were violative of the First and Fourteenth Amendments.

Recently, the Supreme Court applied its Abood analysis to the State Bar of California. Keller, 110 S. Ct. 2228 (1990). Like The Florida Bar, the State Bar of California is an integrated bar that performs a variety of functions, such as "examining applicants for admission, formulating rules of professional conduct, disciplining members for misconduct, preventing unlawful practice of law, and engaging in study and recommendation of changes in procedural law and improvement of the administration of justice." Id. at 2231. Indeed, the State Bar of California has a stronger claim to perform these functions than does The Florida Bar because the State Bar of California is created by California statute, while The Florida Bar is merely an official arm of this Court.

Despite the broad statutory mandate of the State Bar of California to improve "the administration of justice," the

Supreme Court ruled that the bar was prohibited from expending compulsory dues of dissenting members on matters not germane to the regulation of the legal profession and improvement of the quality of legal services. Specifically, the Court declared:

> Here the compelled association and integrated bar is justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity.

Id. at 2236.

In its Schwarz decision, this Court adopted a three part test to be applied when determining "the type of proposed legislative initiatives the Bar may become actively involved with when the legislation appears to fall outside of the [five] specifically-identified areas" adopted by the Court. See supra pp. 5-6.

This three part test, by necessary implication, permits The Florida Bar to use compulsory dues of dissenting Bar members to engage in ideological activities not germane to "regulating the legal profession and improving the quality of legal services." After all, there are likely to be many issues that are "recognized as being of great public importance," where lawyers have the "training and experience to evaluate and explain" the issues, and where the issues affect "the rights of those likely to come into contact with the judicial system," but nevertheless are not germane to "regulating the legal profession and improving the quality of legal services." Any such issues must not be lobbied upon by The Florida Bar through the use of the compulsory dues of dissenting members. In addition, the fact that the Board has adopted legislative lobbying positions 6.a. through 6.h. demonstrates that the Bar is applying the Schwarz criteria in a manner that is violative of the First and Fourteenth Amendments.

Thus, this aspect of the Schwarz standard is an unconstitutional infringement of dissenting Bar members' First and Fourteenth Amendment rights against compelled speech and association. PETITIONER therefore respectfully requests this Court to abrogate the "additional criteria" adopted in its Schwarz decision and to enjoin The Florida Bar, both pendente lite and thereafter, from engaging in any lobbying on legislative positions not clearly within the five subject areas recognized by the Court in Schwarz as clearly justifying legislative activities by the Bar.

IN ACCORDANCE WITH ESTABLISHED PRECEDENT OF THE SUPREME COURT OF THE UNITED STATES, THE FLORIDA BAR IS REQUIRED TO RECOGNIZE ITS MEMBERS' GENERAL OBJECTIONS TO THE USE OF THEIR COMPULSORY DUES TO FUND LEGISLATIVE LOBBYING ACTIVITIES AND IS FURTHER REQUIRED TO PROVIDE REFUNDS FOR SUCH GENERAL OBJECTIONS

Rule 2-9.3(c) of the Rules Regulating The Florida Bar requires dissenting Bar members to "file with the executive director a written objection to a particular position on a legislative issue." Thus, by clear implication from the Rule as well as advice provided by the Bar,[5] general objections to the Bar's legislative activities are not recognized.

Nevertheless, for the past two years, PETITIONER has paid his annual compulsory Bar dues in full with an accompanying letter demanding that no portion of his compulsory Bar dues be used directly or indirectly to fund or support any legislative lobbying by or on behalf of The Florida Bar. Copies of these two

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[5] See Appendices B and C for an example of an exchange of correspondence between PETITIONER and the Bar on the issue of general objections to the Bar's legislative activities.

letters are attached to this Amended Petition as Appendices D and E.[6]

In response, the Bar has asserted that it may lawfully compel PETITIONER, as a dissenting Bar member, to contribute compulsory dues for lobbying activities on the basis of the United States Supreme Court's decision in Keller and the Eleventh Circuit's decision in Gibson v. The Florida Bar, No. 89-3388 (11th Cir. July 23, 1990), as well as the opinion of Bar counsel. Despite numerous requests, the Bar has never explained in any detail to PETITIONER why the Bar will not recognize PETITIONER's general objections to its legislative activities. Thus, the Bar has refused to recognize PETITIONER's general objections to the Bar's lobbying program and has insisted that PETITIONER submit written objections to particular legislative positions in order to receive refunds for the compulsory dues related to the particular objections.

Established precedent of the Supreme Court of the United States, interpreting the First and Fourteenth Amendments to the United States Constitution, make it clear that those who are compelled to pay dues to practice their livelihoods (including

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[6] PETITIONER's letter of August 8, 1990 to the Bar (Appendix C) is slightly broader than his letter of June 14, 1989 (Appendix B) in that the 1990 letter includes amicus filings as well as legislative lobbying. This addition was deemed necessary because the December 1, 1989 issue of The Florida Bar News reported that the Board voted to file its own amicus brief in a case pending before the Supreme Court of the United States. It was further reported that the Board had voted to spend up to $10,000 to have counsel prepare the brief and to have the brief printed. While PETITIONER was subsequently informed by the Bar that none of the authorized $10,000 was spent, PETITIONER recognized that the filing of amicus briefs raises identical issues as those raised by lobbying before the Florida Legislature or Congress.

In Keller, 110 S. Ct. at 2231 n.2, the Supreme Court treated the dissenting bar members' objections to the bar's amicus brief filing program in the same manner it treated the dissenting bar members' objections to the bar's legislative lobbying and resolution adoption activities.

lawyers) may assert general objections to lobbying activities conducted by the recipients of their compulsory dues. Such persons cannot be required to identify specific expenditures to which they object. In Abood, 431 U.S. 209 (1977), the Supreme Court held that non-union teachers could not be compelled to contribute to various political and other ideological activities that they did not approve of. In its decision, the Court stated as follows:

> But in holding that as a prerequisite to any relief each appellant must identify to the Union the specific expenditures to which he objects, the Court of Appeals ignored the clear holding of Allen. As in Allen, the employees here indicated in their pleadings that they opposed ideological expenditures of any sort that are unrelated to collective bargaining. To require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure. It would also place on each employee the considerable burden of monitoring all of the numerous and shifting expenditures made by the Union that are unrelated to its duties as exclusive bargaining representative.

Id. at 241 (emphasis in original).

The Abood decision was cited with approval and relied heavily upon by the Supreme Court of the United States in its recent decision in Keller. This fact makes it evident that Abood is applicable to compulsory bar associations such as The Florida Bar. Dissenting Bar members cannot be compelled to identify specific expenditures to which they object. To the extent that the decisions of this Court and the Eleventh Circuit are inconsistent, they must give way to the clear precedent established by the Supreme Court of the United States.

Similarly, in Gibson v. The Florida Bar, 798 F.2d 1564 (11th Cir. 1986), the Eleventh Circuit reached an analogous conclusion. The federal appellate court, relying upon Abood and applying it to The Florida Bar, stated: "Lawyers would only have to notify the Bar of a general disagreement, since the first amendment also protects an individual's right not to disclose his beliefs." Id. at 1570 n.5.

Moreover, in Schneider v. Colegio de Abogados de Puerto Rico, 682 F. Supp. 674 (D.P.R. 1988), the court applied Abood and invalidated a rule of the integrated bar association that required dissenting bar members to identify specific activities they did not wish to fund. The court stated:

> As a separate matter, the 1986 Rule requires dissenting attorneys to object at the end of the year to specific activities they do not wish to fund. . . . The general objection filed initially acts merely as a "notice of the right to object," and no refund is made until the Review Board adjudicates the specific objections. . . . That, of course, violates the specific mandate of Abood, 431 U.S. at 241 . . . . Once it is determined how much was spent for the activities forecast in the budget that do not come under one of the permissible headings, all those who made general objections should automatically be refunded the proper proportion of their funds.

Id. at 689 (citations to bar rule and quotation from Abood deleted).

Thus, PETITIONER respectfully requests this Court to require The Florida Bar to recognize the established right of all dissenting Bar members to state general objections to the Bar's lobbying activities and to provide dissenters with refunds of all compulsory Bar dues used for legislative lobbying.

PRAYER FOR RELIEF

THEREFORE, PETITIONER prays that the Supreme Court of Florida:

(1) Declare that legislative positions 6.a. through 6.h., as adopted by the Board of Governors during its October 4, 1990 meeting are improper when considered against the standards adopted by the Court in Schwarz;

(2) Declare that the "additional criteria" adopted by the Court in Schwarz must be abrogated in light of the First and Fourteenth Amendments to the United States Constitution;

(3) Issue an order enjoining The Florida Bar, pendente lite and thereafter, from engaging in any lobbying activities to support legislative positions 6.a. through 6.h.;

(4) Issue an order enjoining The Florida Bar, pendente lite and thereafter, from engaging in any lobbying activities to support any legislative positions that are based solely upon the three "additional criteria" adopted by the Court in Schwarz;

(5) Issue an order requiring The Florida Bar to recognize PETITIONER's established right to state general objections to the Bar's lobbying activities and to provide PETITIONER with refunds of all compulsory Bar dues expended on his behalf (plus interest at the legal rate) for legislative lobbying for the dues years 1989-90 and 1990-91, as well as any future years for which PETITIONER submits similar general objections;

(6) Issue an order invalidating the "particular position" language of Rule 2-9.3(c) of the Rules Regulating The Florida Bar and requiring The Florida Bar to recognize all other dissenting Bar members' rights to state general objections to the Bar's lobbying activities and to provide such dissenting members with appropriate refunds (plus interest at the legal rate), as well as any

future years for which other dissenting members submit similar general objections;

(7) Award PETITIONER such additional relief as the Court may deem just and proper; and

(8) Award PETITIONER his costs of this Amended Petition.

Respectfully submitted,

/s/
David P. Frankel
Florida Bar Number 311596
4336 Garrison Street, N.W.
Washington, D.C. 20016-4035
(202) 326-2166

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amended Petition was served via first class mail this 1st day of November, 1990, upon John F. Harkness, Jr., Esquire, Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300.

/s/
David P. Frankel

APPENDIX A

The Florida Bar News/October 15, 1990 [page 4]

Official Notice

Legislative positions adopted

The Board of Governors of The Florida Bar adopted the following legislative positions during its October 4 meeting:

1. Supports expansion of the juror pool to include any persons at least 18 years old who are citizens of the state, residents of their respective counties, and who possess a valid Florida drivers license.

2. Opposes legislation which would repeal the discovery rule relating to depositions in criminal cases.

3. Opposes legislation which would impair IOTA funding for legal services programs.

4. Supports the following positions regarding merit selection and retention of trial judges:

a. The present, existing system for merit selection for appellate judges should be adopted for trial court judges.

b. A Colorado-style citizens board should be established to report retention recommendations.

c. JQC decisions to remove a judge or justice from office or to impose other sanctions should be by a vote of two-thirds of the JQC, and its decisions should be binding unless overruled by no fewer than five justices of the Florida Supreme Court.

d. If statewide merit selection and retention cannot be obtained through the legislature and the required referendum for constitutional amendments, then the state should adopt local option merit selection and retention on an opt-out circuitwide basis.

e. A judge should serve a minimum of one year following appointment prior to any retention election.

5. Supports appropriation of $90,000 for the judicial clerkship intern program with the proviso that these funds be used to provide stipend and relocation expenses to a minimum of 20 participants in the Florida Judicial Clerkship program.

6. Supports the recommendations of The Florida Bar Commission for Children relating to:

a. Expansion of the women, infants and children (WIC) program.

b. Extension of Medicaid coverage for pregnant women.

c. Full immunization of children.

d. Establishing children's services councils.

e. Family life and sex education/teen pregnancy prevention.

f. Increasing Aid to Families with Dependent Children.

g. Enhanced child-care funding and standards.

h. Creation of children's needs consensus estimating conference.

i. Establish family court divisions in each circuit.

j. Termination of parental rights/revision of Chapter 39, F.S.; cocaine-exposed infants.

k. Guardians Ad Litem-dissolution and custody.

l. Establish foster care review boards.

m. Eliminate select public disclosure exemption in child abuse cases.

n. Development of juvenile offender rehabilitation and treatment programs.

7. Supports the resolution of the Florida Law Related Education Association encouraging the Florida Legislature to restore full funding to the Law Education Minigrant Program.

Legislative objections

Under Rule 2-9.3(b)-(e), Rules Regulating The Florida Bar, active members of the Bar may file a written objection to any legislative position adopted by the Board.

Objections properly filed within 45 days of this *News* issue will be considered for a refund of that portion of mandatory dues applicable to the contested legislative position. Within an additional 45 days, the Bar's governing board has the option to grant the appropriate refund to an objector or refer the matter to arbitration.

The arbitration process will determine solely whether the legislative position at issue is within those acceptable activities for which compulsory dues may be used under applicable constitutional law. The objecting member's dues allocable to the contested legislative position will be escrowed promptly upon receipt of the objection, and any refund will bear legal interest.

Any active member may provide written notice to the executive director of The Florida Bar, setting forth an objection to a particular legislative position. Failure to object within 45 days of this *News* issue shall constitute a waiver of any right to object to the particular legislative position.

The policy requires the Bar to publish those legislative positions adopted by the Board in the *News* issue immediately following the meeting at which action was taken.

APPENDIX B

4336 Garrison Street, N.W.
Washington, D.C. 20016
July 18, 1990

Mr. John F. Harkness, Jr.
Executive Director
The Florida Bar
Tallahassee, Florida 32301-8226

Re: Legislative Policies

Dear Mr. Harkness:

I am in receipt of your letter to me dated June 19, 1990 in which you replied to my letter dated June 6, 1990. Clearly, I disagree with the Bar's interpretation of (as you refer to it) "its Abood obligations."

In Abood v. Detroit Board of Education, 431 U.S. 209 (1977), the Supreme Court held that non-union teachers could not be compelled to contribute to various political and other ideological activities that they did not approve of. In its decision, the Court stated as follows:

> But in holding that as a prerequisite to any relief each appellant must indicate to the Union the specific expenditures to which he objects, the Court of Appeals ignored the clear holding of Allen. As in Allen, the employees here indicated in their pleadings that they opposed ideological expenditures of any sort that are unrelated to collective bargaining. To require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or

> his freedom to maintain his own beliefs without public disclosure. It would also place on each employee the considerable burden of monitoring all of the numerous and shifting expenditures made by the Union that are unrelated to its duties as exclusive bargaining representative.

Id. at 241 (emphasis in original).

The fact that the Keller decision relief heavily on the Court's previous Abood decision makes it evident that Abood is applicable to compulsory bar associations such as The Florida Bar. Your June 19, 1990 letter to me confirms this by acknowledging that unified bar associations have to deal with their "Abood obligations."

The Abood decision, as quoted above, makes it clear that dissenting members, such as myself, cannot be compelled to indicate to the compulsory organization the specific expenditures to which they object. However, contrary to this clear language in Abood, The Florida Bar requires dissenting Bar members to, "within forty-five (45) days of the date of publication of notice of adoption of a legislative position, file with the executive director a written objection to a particular position on a legislative issue." See Rule 2-9.3(c) of The Rules Regulating The Florida Bar. This requirement, in light of both Abood and Keller, is unconstitutional and must be deleted.

My June 14, 1989 letter to you in which I "demand[ed] that no portion of my compulsory bar dues be used directly or indirectly to fund or support any legislative lobbying by or on behalf of The Florida Bar" comports with the express language

of the Abood decision. Once again, I renew this demand and further demand that these dues be sent to me immediately.

Sincerely yours,

/s/
David P. Frankel

cc: Frederick J. Bosch, Esq.
Joseph W. Little, Esq.
Herbert R. Kraft, Esq.

APPENDIX C

[SEAL]

THE FLORIDA BAR
650 APALACHEE PARKWAY
TALLAHASSEE, FL 32399-2300

JOHN F. HARKNESS, JR.
EXECUTIVE DIRECTOR

904/561-5600
FAX 904/222-3729

July 26, 1990

Mr. David P. Frankel
4336 Garrison Street, N.W.
Washington, D. C. 20016

Re: Florida Bar Legislative Activities

Dear Mr. Frankel:

At its regular meeting during July 18 & 19, the Board of Governors of The Florida Bar received a preliminary report of its Legislation Committee regarding its consideration of your May 15, 1990 request for possible amendments to the Bar's legislative objection procedure as to venue and cost issues.

At this time, in view of the pending status of the second Gibson appeal before the Eleventh Circuit Court of Appeals, and the petition for certiorari before the United States Supreme Court in the second Schwarz case, the Legislation Committee and other committees resolved to conduct a full review of Florida Bar legislative activities in light of the Keller opinion. It was felt that proposed Bar rule amendments might await the outcome of these ongoing cases due to Board preference for one comprehensive change in our procedures. Again, at that time, this was considered to be an appropriate disposition of your May 15 inquiry,

especially if partial dues rebates continue to be the norm in the Bar's administration of Rule 2-9.3.

Following that Board action, on July 23, 1990 the Eleventh Circuit Court of Appeals upheld our legislative objection procedures, with the one exception that our Rule 2-9.3 interest calculations must be made as of the date that payment of a member's Bar dues was received by this organization. Consequently, I anticipate some interim amendments to our rule in view of this holding. Otherwise, the issues raised in your most recent July 18 correspondence as to The Florida Bar's Abood obligations (as the United States Supreme Court refers to them in Keller) were disposed of in the Eleventh Circuit's ruling in this week's Gibson opinion.

As noted previously, I encourage you to provide the Bar with any specific thoughts you might care to share regarding the venue and cost issues of our objection procedures. I am sure that the activities of our Legislation Committee, in particular, would benefit from any views that you might wish to express regarding particular amendments to our governing procedures.

Cordially,

/s/
John F. Harkness, Jr.

JFHjr:m1W13

cc: Mr. William F. Blews, Chairman, Legislation Committee

APPENDIX D

4336 Garrison Street, N.W.
Washington, D.C. 20016
June 14, 1989

Mr. John F. Harkness, Jr.
Executive Director
The Florida Bar
Tallahassee, Florida 32301-8226

Re: Legislative Lobbying

Dear Mr. Harkness:

Enclosed is my 1989-90 annual dues payment ($140.00) for The Florida Bar. I hereby demand that no portion of my compulsory bar dues be used directly or indirectly to fund or support any legislative lobbying by or on behalf of The Florida Bar.

Sincerely yours,

/s/
David P. Frankel
Florida Bar Number 311596

Enclosure

APPENDIX E

4336 Garrison Street, N.W.
Washington, D.C. 20016
August 8, 1990

Mr. John F. Harkness, Jr.
Executive Director
The Florida Bar
Tallahassee, Florida 32301-8226

Re: Legislative Lobbying

Dear Mr. Harkness:

Enclosed is my 1990-91 annual dues payment ($190.00) for The Florida Bar. I hereby demand that no portion of my compulsory bar dues be used directly or indirectly to fund or support any legislative lobbying or amicus filings by or on behalf of The Florida Bar.

Sincerely yours,

/s/
David P. Frankel
Florida Bar Number 311596

Enclosure

APPENDIX B

ORDER OF THE SUPREME COURT OF FLORIDA

JANUARY 4, 1991

Supreme Court of Florida

FRIDAY, JANUARY 4, 1991

THE FLORIDA BAR **

CASE NO. 76,853

RE: DAVID P. FRANKEL **

Motion to Join as Co-Petitioner filed by Joseph W. Little is hereby granted.

A True Copy

TEST:

/s/ **[SEAL]**
Sid J. White
Clerk Supreme Court

cc: David P. Frankel, Esquire
Joseph W. Little, Esquire
John F. Harkness, Jr., Esquire

APPENDIX C

RESPONSE OF THE FLORIDA BAR TO AMENDED PETITION OF DAVID P. FRANKEL FILED ON JANUARY 28, 1991

***Florida Bar Re David P. Frankel*, No. 76,853 (Fla. filed Oct. 29, 1990)**

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

IN RE: David P. Frankel Case No. 76,853

_____/

RESPONSE OF THE FLORIDA BAR
TO AMENDED PETITION OF DAVID P. FRANKEL

THE FLORIDA BAR ("the Bar") hereby files this response to the amended petition of David R. [sic] Frankel regarding legislative activities of this organization, and respectfully states:

The Petitioner in this action questions the propriety of eight matters formally advocated by The Florida Bar as official legislative positions of this organization. Petitioner argues that these positions violate standards adopted by this Court, and that the Bar should be enjoined from lobbying such issues in the legislative arena. Petitioner further seeks a declaration as to the unconstitutionality of criteria adopted by this Court to assist in determining whether certain topics are appropriate for the Bar's active legislative involvement.

The bulk of Petitioner's argument is premised on this Court's October 1989 opinion in The Florida Bar re Schwarz, 552 So.2d 1094 (Fla. 1989) cert. den. 111 S.Ct. 371 (1990) ["Schwarz II"]. Since that case was decided, the federal constitutional implications of political and ideological activities of the unified bar have been addressed by the United States Supreme Court in Keller v. State Bar of California, ___ U.S. ___, 110 S.Ct. 2228 (1990). Additionally, the specific procedures for member dissent from Florida Bar legislative activities per Bar Rule 2-9.3 have now

been reviewed by lower federal courts, in Gibson v. The Florida Bar, 906 F.2d 624 (11th Cir. 1990) petition for cert. filed (U.S., Jan. 17, 1991) (No. 90-1102) ["Gibson II"].

RECENT UNITED STATES SUPREME COURT ACTION HAS CLARIFIED THE FIRST AMENDMENT IMPLICATIONS OF POLITICAL ACTIVITIES OF THE INTEGRATED BAR

Rendition of Keller v. State Bar of California on June 4th of last year finally clarified the federal constitutional implications of certain uses of mandatory dues money within the integrated bar.

Keller involved a member challenge of various political activities of the integrated State Bar of California, all principally financed through the use of compelled membership dues. Those questioned matters, as listed by the Court, included: lobbying of the state legislature and other governmental agencies; the filing of amicus curiae briefs in pending cases; the conduct of an annual Conference of Delegates at which issues of current interest were debated and resolutions approved; and the presentation of a variety of education programs.

Consistent with the flow of lower court pronouncements, the Keller Court analogized the integrated bar to the compulsory union/agency shop environment. That opinion held the use of mandatory dues to financially underwrite a bar's political activities is violative of dissenting members' First Amendment rights in certain, but not all, instances. Reciting its ruling in the labor union case of Abood v. Detroit Bd. of Education, 431 U.S. 209 (1977), the Court stated:

> Abood held that a union could not expend a dissenting individual's dues for ideological activities not "germane" to the purpose for which compelled association was justified: collective bargaining. Here the compelled association and integrated bar is justified by the State's

> interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity.

Keller, 110 S.Ct. at 2236.

Then, in revisiting its only other pronouncement on the integrated bar—Lathrop v. Donohue, 367 U.S. 820 (1961)—the Court concluded:

> Thus, the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or "improving the quality of the legal service available to the people of the State." Lathrop, 367 U.S., at 843, 81 S.Ct., at 1838 (plurality opinion).

Keller, 110 S.Ct. at 2236.

The U.S. Supreme Court gave additional guidance as to how an integrated bar might properly address the First Amendment implications of Keller, as premised on Abood and related labor cases. Application of those cases involves a determination of the proportionate share of compulsory membership dues that dissenting members may be required to contribute toward support of authorized bar programs that are otherwise constitutional for First Amendment purposes.

For such "proportionate share" determinations, Keller endorsed the approach approved in Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986). That opinion enunciated the constitutional standards for a union's collection, as exclusive bargaining agent for members and non-members, of proportionate share payments from non-union members who benefited from union representation. The Court said such

collection must include: "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." Chicago Teachers, 475 U.S. at 310.

Commenting further on this methodology, the Keller Court observed:

> In Teachers v. Hudson, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), where we outlined a minimum set of procedures by which a union in an agency shop relationship could meet its requirement under Abood, we had a developed record regarding different methods fashioned by unions to deal with the "free rider" problem in the organized labor setting. We do not have any similar record here. We believe an integrated bar could certainly meet its Abood obligation by adopting the sort of procedures described in Hudson. Questions as to whether one or more alternate procedures would likewise satisfy that obligation are better left for consideration upon a more fully developed record.

Keller, 110 S.Ct. at 2237 - 8.

THE EIGHT LEGISLATIVE POSITIONS IN QUESTION ARE WITHIN ALLOWABLE SUBJECT AREAS OF POLITICAL INVOLVEMENT OF THE FLORIDA BAR

The Florida Bar's legislative programming has been shaped by state Supreme Court-promulgated rules and case law since integration of the Bar in 1950. Generally speaking, pertinent court opinions have reflected varying pronouncements on either the Bar's corporate authority or constitutional limitations in the legislative arena: Gibson II; Gibson v. The Florida Bar, 798 F.2d 1564 (11th Cir. 1986) ["Gibson I"]; Schwarz II; The Florida Bar re. Schwarz, 526 So.2d 56 (Fla. 1988) ["Schwarz I"]; The Florida

Bar re. Amend. to Rule 2-9.3, 526 So.2d 688 (Fla. 1988); In re Amendment to Integration Rule of The Florida Bar, 438 So.2d 213 (Fla. 1983); and In re Florida Bar Board of Governors' Action, 217 So.2d 323 (Fla. 1969).

In Schwarz I the Supreme Court of Florida considered a petition which questioned "the legality, propriety, scope and procedures, if any, through which this Court may exercise political power" through The Florida Bar. Schwarz I, 526 So.2d at 56. As a result of that action, this Court commissioned a review of the Bar's legislative program by Florida's Judicial Council. Recommendations from that Council were subsequently approved and adopted by this Court "as guidelines to be followed with respect to determining the scope of permissible lobbying activities of The Florida Bar." Schwarz II, 552 So.2d at 1098. This Court noted

> In seeking to define the administration of justice and the advancement of the science of jurisprudence, the Council recommended that the following subject areas be recognized as clearly justifying legislative activities by the Bar.
>
> (1) Questions concerning the regulation and discipline of attorneys;
>
> (2) matters relating to the improvement of the functioning of the courts, judicial efficacy and efficiency;
>
> (3) increasing the availability of legal services to society;
>
> (4) regulation of attorneys' client trust accounts; and
>
> (5) the education, ethics, competence, integrity and regulation as a body, of the legal profession.

Special Report on Legislative Activities, supra, at 9. The Council also recommended that the following additional criteria be used to determine "the type of proposed legislative initiatives the Bar may become actively involved with

when the legislation appears to fall outside of the above specifically identified areas."

(1) That the issue be recognized as being of great public interest;

(2) that lawyers are especially suited by their training and experience to evaluate and explain the issue; and

(3) the subject matter affects the rights of those likely to come into contact with the judicial system.

Id. at 9-10.

Schwarz II, 552 So.2d at 1095.

Petitioner seeks to make the Bar accountable, solely under Schwarz II, for the propriety of eight particular legislative positions adopted by the Board of Governors in October 1990. The questioned topics are a part of 14 separate recommendations of The Florida Bar Commission for Children, a prestigious interdisciplinary group which, for two years, has undertaken a substantial and in-depth examination of children's issues, societal problems and the role of lawyers in contributing to the solution of these problems. These topics were also a part of this organization's legislative agenda in the 1988-90 biennium but were formally "sunsetted" in July 1990 in accordance with official Bar policy. Legislative Policy and Procedure 9.11(d), 64 Fla.B.J. 128 (Sept. 1990).

As formally noticed per Bar Rule 2-9.3 in the October 15, 1990, issue of The Florida Bar News, the challenged topics include:

a. Expansion of the women, infants and children (WIC) program.

b. Extension of Medicaid coverage for pregnant women.

c. Full immunization of children.

d. Establishing children's services councils.

e. Family life and sex education/teen pregnancy prevention.

f. Increasing Aid to Families with Dependent Children.

g. Enhanced child-care funding and standards.

h. Creation of children's needs consensus estimating conference.

The Florida Bar News, Oct. 15, 1990, at 4, col. 2.

Each of these issues was more fully described within a special issue of The Florida Bar Journal which predated the Board's action by some seven months: See Middlebrooks & Streit, "Lawyers Cannot Remain Silent," 64 Fla.B.J. 10 (Mar. 1990).

Petitioner proclaims that none of these legislative positions meets any of the five Schwarz II guidelines that would clearly justify Bar legislative involvement. He makes no argument that these matters are ultra vires in the corporate sense, nor should he in view of this Court's authorization for the Bar to "[e]stablish, maintain, and supervise . . . [p]rograms for promoting and supporting the Bar's public service obligations and activities . . ." Rules Regulating The Florida Bar 2-3.2(c)(8). Yet, if such advocacy must be judged by the three subordinate criteria in Schwarz II, the challenged topics still appear to be well within those guidelines.

As to the first criterion, Petitioner readily concedes the great public interest of these issues. With regard to the second criterion, the impressive and convincing presentation of these political priorities and other moral concerns of the legal profession—evidenced by a special Journal compendium and by the ultimate legislative passage of many of these measures—verifies the specialty of training and experience within this profession to more than suitably evaluate and explain these matters.

As stressed in the comments of Bar leadership, such "advocacy and protection for children that only lawyers can provide" is "one of the highest callings of our profession" in keeping with "the highest ideals of professionalism and the role of lawyers in our society as counselors and healers." Zack, "To Volunteer to Help is to Light a Candle of Hope," 64 Fla.B.J. 4 (Mar. 1990).

The general charge to The Florida Bar Commission for Children further explains:

> A major priority of The Florida Bar during the upcoming year will be children's issues. The Florida Bar Commission for Children, composed of judges, lawyers, medical doctors, business executives, legislators, and community leaders, will recommend legislation for inclusion in The Florida Bar legislative program, as well as changes in court rules and legal practice. The Commission will also explore sources of funding for children's programs. . . .
>
> . . .
>
> The leadership of The Florida Bar believes that a greater investment of time and money spent on children in their early years will result in better, safer, more productive lives for all Floridians. The Commission's responsibility is to work to translate this belief into reality through utilization of the time and resources of Florida lawyers and cooperation with other groups and professions.

The Florida Bar, General Orientation Materials to The Florida Bar Commission for Children 1 (July 1989) (available at Florida Bar Headquarters)

None other than our current Governor, in the special Journal discussion of children's issues, unequivocally proclaimed: "Certainly our profession bears a special responsibility to

represent unprotected and defenseless children." Chiles, "Florida's Children as Human Capital," 64 Fla.B.J. 8 at 9 (Mar. 1990).

Pointed language in the preamble to this Bar's Rules of Professional Conduct regarding a lawyer's responsibilities, unconditionally states that "[a]s a public citizen, a lawyer should seek improvement of the law, the administration of justice, and the quality of service rendered by the legal profession." Rules Regulating The Florida Bar, Ch. 4.

In weighing the propriety of advocating these questioned topics the Bar's Legislation Committee chairman observed, "Who better to speak for those who cannot speak, than lawyers for children?" The Florida Bar News, Nov. 15, 1990, at 1, col. 2.

The training and experience of lawyers to evaluate and explain issues affecting children would seem heavily underscored by the 1984 action of the American Bar Association which read:

> BE IT RESOLVED, That the American Bar Association urges the members of the legal profession, as well as state and local bar associations, to respond to the needs of children by directing attention to issues affecting children including, but not limited to: (1) the preservation of children's legal rights; (2) the needs of children who have no effective voice of their own in government; (3) drug and alcohol abuse among children; (4) establishment of character, citizenship, parenting skills, and child safety programs in public education; (5) implementation of statutory and programmatic resources to meet the health and welfare needs of children; (6) missing and molested children; and (7) establishment of guardian ad litem programs.

A.B.A. H. Res. 103A, 1984 Midyr. Mtg. (1984).

Inspiration for that ABA pronouncement, in part, stemmed from the salutory [sic] accomplishments of The Florida Bar's

Committee on the Legal Needs of Children. That group, whose mission is now incorporated within the Commission for Children, was created in 1983 and represented the first interdisciplinary children's committee sponsored by a state bar. The activities of that predecessor committee have been well chronicled within this Bar, long known by this Court, and never questioned.

Indeed, it would seem indisputable that children—wards of the court—are the responsibility of lawyers as officers of the court. In the context of reviewing juvenile dependency proceedings in our state, this Court recited the conclusions of one of its own ad hoc study committees which observed, "a greater investment of time by lawyers in the system is necessary, if we are to protect the important rights of the children and families whose lives come under the control of the system." The Florida Bar In re Advisory Opinion HRS Nonlawyer Counselor, 547 So.2d 909 at 910 (Fla. 1989).

The foregoing should easily support the involvement of The Florida Bar in these matters under the second prong of Schwarz II's three additional criteria—and even arguably suggest "clear justification" for advocacy of such matters due to their relationship to the "ethics" and "integrity" of the legal profession under the fifth guideline of that opinion.

And, as to Schwarz II's third criterion, regardless of Petitioner's dismissal of (1) any nexus between the rights affected by these legislative issues and (2) some reason that unprotected children may come into contact with the judicial system, that view is disputed by one of Florida's premier prosecutors:

> As I analyze the background of people who commit crime, I see recurring patterns: a child born into poverty, raised by a single parent in substandard, squalid housing without adequate health care, left to wander the streets after school, ignored by a parent who has plunged into drugs, truant at nine years of age, a dropout at 13, a delinquent at 14, and in prison at 18.

. . .

> Each scenario is different, but common sense dictates that unless we make a major investment in our children up front, we will pay far more for prisons and the cost of crime by the time these children turn 18.

Reno, "To Protect Our Children is to Prevent Crime," 64 Fla.B.J. 16 (Mar. 1990).

Press accounts of the Bar's Legislation Committee deliberations on these measures highlight similar debate on this identical concern. The Florida Bar News, Nov. 15, 1990, at 2, col. 3.

The preceding analysis should therefore confirm the propriety of the Bar's involvement in these legislative matters under the application of the three additional Schwarz II criteria. Still, Schwarz II further admonishes the Bar to "exercise caution in the selection of subjects upon which to take a legislative position so as to avoid, to the extent possible, those issues which carry the potential of deep philosophical or emotional division among the membership of the Bar." Schwarz II, 552 So.2d at 1097.

Following the extensive Journal discussion of these topics and their formal notice for member reaction, only nine objections against these specific measures—from a membership of 45,166—were filed under the provisions of Bar Rule 2-9.3. During the 1988-90 legislative biennium, these issues garnered but three member objections. All have been paid or authorized partial dues rebates from the Bar. Further, that Journal presentation chronicled some $27,000 in voluntary contributions from 526 lawyers toward a separate Florida Bar Children's Fund—and donations increased appreciably after that publicity. These reports hardly signal any deep division on these measures that bear on the ethics and integrity of our legal profession.

In sum, The Florida Bar would maintain that the eight legislative positions challenged by Petitioner are appropriate when considered against the standards adopted by this Court in

Schwarz II. Consequently, no order should issue, pendente lite or thereafter, enjoining The Florida Bar from engaging in any lobbying activities pertaining to these issues.

ADDITIONAL CRITERIA OF THIS COURT FOR DETERMINING ACCEPTABLE LEGISLATIVE ACTIVITIES OF THE FLORIDA BAR ARE VALID UNDER THE UNITED STATES CONSTITUTION

Petitioner further seeks from this Court a declaration that the three "additional criteria" adopted in Schwarz II are violative of the First and Fourteenth Amendments to the United States Constitution, both in their express language and as applied.

The Bar notes the uniqueness of this additional request, filed pursuant to this tribunal's declaration that "any member of The Florida Bar in good standing may question the propriety of any legislative position taken by the Board of Governors by filing a timely petition with the Court" [Schwarz II, 552 So.2d at 1097] and the authorization of "injunctive actions seeking to prevent unauthorized bar activities and expenditures" [The Florida Bar re Amend. to Rule 2-9.3, 526 So.2d at 689]. These cases say nothing on the issue of awarding attorneys' fees to a member-objector, and such relief would seem totally inappropriate in the event of failure to prevail in such proceedings or the assertion of a nonmeritorious claim.

If Schwarz II is premised on federal constitutional considerations, it must certainly be reconciled with the Keller holding. Nevertheless, the five primary guidelines in Schwarz II seemingly fit squarely within Keller's dual standard for the uses of compulsory Bar dues. Interestingly, the argument for issuance of a writ of certiorari to the United States Supreme Court in Schwarz II, made personally by Mr. Schwarz, acknowledged that this Court's five guidelines "are appropriate under Keller." Petitioner's Supplemental and Reply Brief in Support of Petition for Writ of Certiorari at 7, Schwarz II.

If, however, Schwarz II was meant to be an interpretation of this Bar's chartered purposes, the observation best said by the Eleventh Circuit panel in Gibson I has great significance:

> Abood specifically noted that the union was free to politicize on any issue of interest to that group. See 431 U.S. at 235, 97 So.Ct. at 1799. Only the use of compelled funds was prohibited for issues unrelated to collective bargaining. Id. Similarly, the Bar may speak as a group on any issue as long as it does so without using the compulsory dues of **dissenting** members.

Gibson I, 789 F.2d at 1570 (footnote omitted) (emphasis in original; boldface emphasis added).

Certainly The Florida Bar desires to speak as a group on any issue it is authorized by this Court to advocate—and will accommodate member dissent in the process. With regard to this point, the Bar would maintain that the Schwarz II opinion reads much like another discussion of this organization's corporate authority in the political arena, primarily influenced by provisions in the Bar's charter document and by consideration of basic member relations concerns. Aside from a singular reference to the Judicial Council's preliminary conclusions as to the constitutionality of general Bar lobbying [552 So.2d at 1095], only Justice McDonald's dissenting opinion in Schwarz II even mentions the First Amendment [552 So.2d at 1098]. Concern over The Florida Bar's delegated authority is further indicated by this Court's extensive references, in Schwarz I, to the Supreme Court of New Hampshire's resolution of that state bar's advocacy role:

> The court noted that the issue was whether or not the board's decision to oppose tort reform was inconsistent with the powers and authorities conferred upon the bar association. The New Hampshire Court commented that it "is obligated to interpret the limits on bar activities so as to preclude the first amendment infringement that would result if the Association were to take positions on issues outside the scope of those responsi-

> bilities that justify compelling lawyers to belong to it." [In re Chapman, 128 N.H.24, 509 A.2d 753 (1986)] at 31, 509 A.2d at 758.

Schwarz I, 526 So.2d at 58.

The guidelines in Schwarz II would appear to be a restrained pre-Keller effort by this Court to redefine The Florida Bar's chartered authority, done with an appreciation of the dynamic nature of this issue within the federal courts and throughout the integrated bar community: Schwarz I, 526 So.2d at 57, n. 4. The three Schwarz II criteria, if confirmed as pronouncements of The Florida Bar's range of corporate authority in the political arena, present absolutely no federal constitutional question, regardless of their scope, provided member dissent is accommodated consistent with Chicago Teachers for those issues advocated beyond Keller's two core areas. Nor is injunctive relief appropriate in this instance.

The Bar submits that an appropriate dissent mechanism was in place to protect Petitioner and all its members—that the three additional criteria in Schwarz II are a fully constitutional recitation of this organization's authorized range of political advocacy beyond issues of lawyer regulation and the delivery of legal services, per Keller. And, because of such available relief for dissenting Bar members, this range of activity should be accorded an interpretation broad enough to authorize the legislative activity at issue in this case.

Most importantly, if the logic of the Supreme Court of New Hampshire in Chapman still influences any application of the Schwarz II rationale, this Court is certainly no longer obligated to construe the corporate limits of The Florida Bar's political activities in a manner identical to First Amendment parameters. Given the clarity of Keller as to the constitutional uses of compulsory dues vis-a-vis member objection, and the protection of Chicago Teachers in order to accommodate such dissent, this Court may confer on The Florida Bar the utmost power and authority it can delegate in the legislative arena.

THERE IS NO PROCEDURE PROMULGATED BY THIS COURT OR ANY CONSTITUTIONAL IMPERATIVE THAT REQUIRES THE FLORIDA BAR TO RECOGNIZE A GENERAL OBJECTION TO ANY OF ITS LEGISLATIVE ACTIVITIES

Petitioner finally seeks this court to require The Florida Bar to recognize "the established right" of dissenting members to state general objections to The Florida Bar's lobbying activities, and to provide dissenters with refunds of all compulsory dues used for legislative lobbying.

Petitioner asserts that the past decisions of this Court and the most recent federal court rulings on this point are contrary to "clear precedent" from the United States Supreme Court. In support of that thesis, Petitioner selectively cites from Abood, which predates Chicago Teachers by some nine years. Prior to the holding in Chicago Teachers that a union's collection of proportionate share payments must include "an adequate explanation of the basis for the fee," it was quite logical for the Abood Court to have been sensitive to a dissident's difficulty in identifying "the specific expenditures" [97 S.Ct. at 1802] for possible objection, and in monitoring "all the numerous and shifting expenditures" [97 S.Ct. at 1803] that a union might incur. Now, however, a member objection procedure which comports with Chicago Teachers should vitiate that argument—especially when the formal notice provisions of that procedure include specificity as to contestable matters and substantially reduce any burden of monitoring the organization's political activities.

Absent any clear Supreme Court pronouncement on the general objection issue since Chicago Teachers, the Eleventh Circuit addressed the precise point raised by Petitioner in the Gibson II opinion.

> Gibson next contends that the Bar's procedures impermissibly require dissenting members to object on an issue-by-issue basis, thus forcing them to identify their

own political positions. The Bar responds that members need only make a generalized objection that a given issue is not closely enough related to the Bar's purposes to justify an expenditure of compulsory dues. The Bar claims that such an objection does not impermissibly require objectors to disclose their own position regarding the issue. We agree.

As the Supreme Court has stated, the dissenter "has the burden of raising an objection." Chicago Teachers, 475 U.S. at 306, 106 S.Ct. at 1075 (citing Abood, 431 U.S. at 239-40 & n. 40, 97 S.Ct. at 1801-02 & n. 40). This burden "is simply the obligation to make his objection known." Id. 475 U.S. at 306 n. 16, 106 S.Ct. at 1075 n. 16. The affirmative objection requirement here is within the scope of this obligation. It merely requires the objector to inform the Bar that he objects to the Bar's use of compulsory dues to support a given legislative policy. Beyond that, the objector need not provide any further information concerning the motivation for his objection or his own position concerning the legislative policy at issue. We therefore reject Gibson's challenge on this point.

Gibson II, 906 F.2d at 632.

Rejection of that challenge seemed hardly inconsistent with the Eleventh Circuit's earlier ruling in the Gibson I litigation although Petitioner is even more selective in his references to a footnote within that opinion. In that case, although the Court indicated understandable concern over the First Amendment protection of a dissident Bar member's right not to disclose his beliefs, the Court observed—in the very passage cited by Petitioner—that "the difficult task of discerning proper Bar position issues could be avoided by. . .(2) a refund procedure allowing dissenting lawyers to notify the Bar that they disagree with a Bar position, then receive that portion of their dues allotted to lobbying." Gibson I, 798 F.2d at 1570 n. 5 (emphasis added).

That holding and all others on the subject otherwise sanction a mandatory membership organization's use of compulsory dues for political or ideological activities germane to the group's basic purposes, member dissent notwithstanding. And, when dissent must be accommodated with regard to non-germane matters, applicable case law acknowledges the necessity of a somewhat focused objection. Petitioner cites from Abood but, again, seemingly overlooks the significance of his own authority, which observed: "As in Allen [Railway Clerks v. Allen, 373 U.S. 113 (1963)], the employees here have indicated in their pleadings that they opposed ideological expenditures of any sort **that are unrelated to collective bargaining**." Abood v. Detroit Bd. of Education, 431 U.S. 209 at 241 (emphasis in original; boldface emphasis added).

Yet Petitioner contends in this action, as he has done in his written communications to The Florida Bar, that no portion of his compulsory dues be used to fund any legislative lobbying whatsoever. The correspondence shared with the Court as Appendices D & E to the Amended Petition does not express Petitioner's limited opposition to that lobbying unrelated to the Bar's core functions. Instead, Petitioner seeks a complete bye on supporting any advocacy of the integrated Florida Bar which, as Justice Terrell observed, is "the process by which every member of the bar is given an opportunity to do his part in performing the public service expected of him, and by which every member is obliged to bear his portion of the responsibility." Petition of Florida State Bar Association, 40 So.2d 902 at 904, (Fla. 1949).

That original notion has continuing significance with respect to the core functions of today's integrated bar. As the Keller Court underscored:

> The plan established by California for the regulation of the profession is for recommendations as to admission to practice, the disciplining of lawyers, codes of conduct, and the like to be made to the courts or the legislature by the organized bar. It is entirely appropriate that all of the lawyers who benefit from the unique status of

being among those admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in this effort.

Keller, 110 S.Ct. at 2235.

Petitioner asserts that, "despite numerous requests, the Bar has never explained in any detail to Petitioner why the Bar will not recognize Petitioner's general objection to its legislative activities." Yet, at least seven separate responses from the Bar's executive director to Petitioner essentially reiterate the previous argument herein, where it is noted that pertinent case law authorizes the use of compulsory dues on topics germane to the Bar's core purposes, and that this Court's adoption of a member objection procedure in Bar Rule 2-9.3 contemplates objections to specific legislative positions.

In the interest of brevity, the Bar's direct response to Petitioner's August 8, 1990 and June 14, 1989 correspondence (Petitioner's Appendices E & D, respectively), plus one of several objection letters, are attached to this response as Respondent's Appendices A, B & C respectively. Petitioner's demands for a free ride on even the most basic matters of Bar business is contrary to all applicable precedent.

A RESOLUTION OF THE INSTANT PETITION MAY INVOLVE COLLATERAL ISSUES OF SIGNIFICANCE TO THE LEGISLATIVE ACTIVITIES OF THE FLORIDA BAR

These comments only address the matters directly raised by the Amended Petition in this case. However, it should be noted that Bar Rule 2-9.3, regarding member objections to legislative activity of The Florida Bar, is presently before this Court (Case No. 76,853 [sic]) for various amendments resulting from the Gibson II ruling, Schwarz II and prior commentary from the Petitioner in this instant action. Mr. Frankel has already filed

additional comments in that case, requesting oral argument as well.

The Bar would respectfully submit that, if procedural aspects of this organization's legislative activities may be impacted in a resolution of the instant petition, that this related case be considered in conjunction with this matter to whatever degree is deemed necessary. Should a formal notice to consolidate these actions be in order, the Bar will formally do so when appropriate; otherwise, no objection is expressed against such consolidation sua sponte by this Court.

CONCLUSION

The Florida Bar respectfully submits that the "additional criteria" of Schwarz II and the legislative positions at issue in this action are acceptable and constitutional under controlling law, that the injunctive relief and Bar Rule revisions sought in this case are inappropriate, and that no additional relief or costs are merited in this matter.

Respectfully submitted,

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By: /s/
John F. Harkness, Jr.
Florida Bar #0123390

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to: David P. Frankel, 4336 Garrison Street, N.W., Washington, D.C. 20016 and Joseph W. Little, 3731 N.W. 13th Place, Gainesville, Florida 32605, by mail, this 28 day of January, 1991.

/s/
John F. Harkness, Jr.

Exhibit A-1

[SEAL]

THE FLORIDA BAR
650 APALACHEE PARKWAY
TALLAHASSEE, FL 32399-2300

JOHN F. HARKNESS, JR.
EXECUTIVE DIRECTOR

904/561-5600
FAX 904/222-3729

August 20, 1990

Mr. David P. Frankel
4336 Garrison Street, N.W.
Washington, D. C. 20016

Re: The Florida Bar Legislative Activities

Dear Mr. Frankel:

This letter acknowledges receipt of your 1990 Florida Bar dues in full and further responds to your August 8 request that no portion of your compulsory dues "be used directly or indirectly to fund or support any legislative lobbying or amicus filings by or on behalf of The Florida Bar."

Our previous exchanges of correspondence noted the recent federal court opinions in the case of Keller v. State Bar of California and the latest ruling in the continuation of Gibson v. The Florida Bar. Based on these rulings and the opinion of counsel, The Florida Bar presently views its dues rebate procedure under Bar Rule 2-9.3 as an acceptable method for dealing with member dissent regarding political activities of this organization. Otherwise, our governing board is engaged in an ongoing review of The Florida Bar's full programming in light of these recent federal opinions.

Both Gibson and Keller require a member dissent procedure allowing possible rebate of mandatory dues money directed at the advocacy of certain political or ideological issues, but otherwise allow the Bar's use of such funds in connection with any topic germane to the Bar's goals of regulating the legal profession and improving the quality of legal services, member dissent notwithstanding. The Gibson opinion specifically sanctioned Bar Rule 2-9.3 which contemplates your full payment of outstanding dues, with a subsequent opportunity for timely objection to legislative positions of The Florida Bar once they are formulated and officially published for appropriate member comment. Consequently, under our present administration of Rule 2-9.3, The Florida Bar does not recognize any generalized objection to unspecified legislative activities such as those raised in your August 8 correspondence.

Further, my July 26 correspnodence [sic] to you was meant to stress that the Board of Governors may immediately consider certain amendments to Rule 2-9.3 based on the remand of the latest Gibson cases, and other suggested changes resulting from the second Schwarz opinion. Nevertheless, your longstanding concerns regarding venue and cost issues of any Rule 2-9.3 arbitration proceeding remain topical—although I cannot forecast whether they would be immediately acted upon by the Board of Governors at its October 3-6 meeting following Legislation Committee consideration.

Because of ongoing review of various Keller and Gibson issues, I again encourage you to provide the Bar with any specific thoughts you might care to share regarding any aspect of our objection procedure. At its September 5 and October 3 meetings, our Legislation Committee may finalize any suggested rule revisions deemed necessary by recent case developments; your suggested revisions may be worthwhile additions to any rewrite submitted to the Supreme Court of Florida for final adoption. In any event, our deliberations would benefit from any views that you might wish to express regarding particular amendments to our governing procedures.

Cordially,

John F. Harkness, Jr.

JFHjr:mlM18

Enclosures

Exhibit B-1

[SEAL]

THE FLORIDA BAR
650 APALACHEE PARKWAY
TALLAHASSEE, FL 32399-2300

JOHN F. HARKNESS, JR.
EXECUTIVE DIRECTOR

904/561-5600
FAX 904/222-3729

June 23, 1989

Mr. David P. Frankel
4336 Garrison Street, N.W.
Washington, D.C. 20016

Dear Mr. Frankel:

This letter is to formally advise you of action taken on your proposed resolution concerning legislative activities of The Florida Bar, considered during the June 16 General Assembly proceedings of our 1988-89 Annual Meeting. I will also address the comments contained in your June 1 and 2 letters dealing with this topic and your most recent legislative objections. Finally, I shall respond to your June 14 correspondence which accompanied your 1989-90 annual dues payment.

At last week's convention, participants at the General Assembly voted against the resolution officially noticed in the June 1, 1989 edition of The Florida Bar News. Votes were cast by having attendees stand up, for or against the measure. Because of the significant disparity in pro and con votes, no formal tally was taken. The chair ruled that the measure was defeated, without additional chailenge. Consistent with last year's action and the recent vote of our Executive Committee, all proxies were ruled out of order.

Your June 1 comments regarding the Executive Committee's role in our legislative activities are noted. Bar Rule 2-3.12 and The Florida Bar's Legislative Policy and Procedure recognize the necessity of Executive Committee action in lieu of our Board of Governors during an ongoing legislative session. Composition of the Executive Committee is presently sanctioned by Bar Rule 1-4.3. These provisions may be reconsidered by our Board upon review of your correspondence, otherwise Bar Rules allow for suggested amendments to our charter document by individual members if that is a course of action you care to pursue.

Your observation regarding venue and costs of any arbitration proceedings under Bar Rule 2-9.3 have been noted in previous correspondence. Similarly, the propriety of a general objection has been discussed in several letters between us. I acknowledge those comments again. Otherwise, our file reflects a recurring dialogue in which the Bar's position on these issues has been shared with you. These issues presumably are now under consideration by the Supreme Court of Florida in the Schwarz case. I suggest you await further guidance from that tribunal, as the Bar is doing. Consequently, your June 14 request for remission of dues is considered inappropriate.

Additionally, I refer you to The Florida Supreme Court's June 2, 1988 opinion for guidance on the finality of Rule 2-9.3 arbitration proceedings. A photocopy of that case is enclosed for your review since you note that it was omitted from my May 24 correspondence. I assume you have been provided this case in all previous acknowledgements of your past legislative objections.

You further inquire about Legislative Positions 14-18. Copies of the Bar News editions containing the official notices of these positions are enclosed. Under our interpretation of Rule 2-9.3, your June 2 correspondence would be considered an untimely objection to these matters. As you should recall from previous communications, however, such action will not likely affect any possible dues refund you might receive under governing policy. Until the Bar has refined a method to specifically allocate costs attributable to each legislative position, a member who objects to

a single issue may receive the full amount of dues money attributable to the Bar's entire legislative program.

Your challenge to Legislative Positions 29-31 will be formally acknowledged in separate correspondence following the deadline for objections to this group of legislative positions. I hope the foregoing is responsive to your most recent inquiries. Thank you for your continuing interest in these topics.

Cordially,

John F. Harkness, Jr.

JFHjr:dtF7

Enclosures

Exhibit C-1

[SEAL]

THE FLORIDA BAR
650 APALACHEE PARKWAY
TALLAHASSEE, FL 32399-2300

JOHN F. HARKNESS, JR.
EXECUTIVE DIRECTOR

904/561-5600
FAX 904/222-3729

May 24, 1989

Mr. David P. Frankel
4336 Garrison Street, N.W.
Washington, D.C. 20016

Re: Objection to Florida Bar Legislative Positions

Dear Mr. Frankel:

This letter acknowledges receipt of your April 18, 1989 correspondence indicating your objections to those legislative positions adopted by The Florida Bar and officially noted in the April 1, 1989 issue of The Florida Bar News: specifically, positions 19-22 within that notice. Your additional challenge to positions 23 & 24 is noted but will be formally acknowledged in separate correspondence following the deadline for objections to this other group of legislative positions. Your objection to positions 1-13 is again noted and remains of record.

In accordance with Bar policy, that portion of your membership dues allocable to these contested legislative positions has been escrowed for possible repayment to you, with applicable interest, in the event any refund is deemed appropriate by the Board of Governors or an arbitration panel. A copy of the Florida Supreme Court opinion which adopted this Bar rule is enclosed for your review.

Under this policy, The Florida Bar Board of Governors shall have until June 30, 1989 to grant an appropriate refund to you or refer this matter to arbitration. You will be promptly advised of the Board's action following this latter date.

Pending implementation of a method to specifically allocate costs attributable to each legislative position of The Florida Bar, an amount equal to your pro rata support of the Bar's entire legislative program has been placed in escrow.

This amount—$7.70 of your $140.00 in membership dues for the current fiscal year—was calculated based upon the July 1, 1988 Bar membership in good standing of 42,974 divided into the approved July 1 legislative budget of $330,973 as published in the April 15, 1988 issue of The Florida Bar News. The budget amount was composed of the following:

	Legislation	Tort Review	Total
Staff and office expense	$189,500	$5,000	$194,500
Other personal service	69,000		69,000
Travel	22,212		22,212
Other expense	8,234	5,000	13,234
Internal services and administration	31,301	726	32,027
	$320,247	$10,726	$330,973

At the conclusion of the Bar's fiscal year (June 30, 1989) and 1988-89 audit, we will be able to ascertain the actual amount of funds spent on legislation and then determine the final amount of any refund that may be due.

Your comments regarding venue for any arbitration proceeding and your request for recognition of a continuing objection to all future Bar legislative positions are noted once more. Again, the issue of venue is premature for further consideration. Otherwise, the Bar's legislative procedure does not recognize a generalized or standing objection. The policy contemplates objections to specific issues, recognizing that this organization may use

compulsory dues on any topic germane to the Bar's stated purposes: see, Gibson v. The Florida Bar, 798 F.2d 1564, 1569 (11th Cir. 1986) and Bar Rule 2-9.3(e)(1).

Cordially,

John F. Harkness, Jr.

JFHjr/PFH:dtW16/X122

APPENDIX D

LETTER FROM FLORIDA BAR COUNSEL BARRY RICHARD TO FLORIDA BAR PRESIDENT JAMES MILLER

OCTOBER 17, 1990

ROBERTS, BAGGETT, LAFACE & RICHARD
ATTORNEYS AT LAW

[Addresses and telephone numbers omitted]

October 17, 1990

Honorable James Fox Miller
President, The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300

Dear President Miller:

You have requested my opinion regarding the following question:

> Can The Florida Bar lawfully boycott a particular community in order to further certain social causes relating to the welfare of minority ethnic groups?

For the reasons stated below, it is my opinion that the answer to your question is no.

The controlling factor is that The Florida Bar is not a voluntary association. Membership and payment of dues are a compulsory prerequisite to practicing law in Florida on a continuing basis. As a result, narrow restrictions are placed upon the political and ideological activities of the Bar by both its own charter and the United States Constitution.

Article V, Section 15, of the Florida Constitution grants to the Florida supreme [sic] Court, "exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted." Pursuant to this grant of power, the Supreme Court has adopted the Rules Regulating The Florida

Bar which imposes compulsory membership and, in Section 1-2, states the purpose of the Bar:

> The purpose of The Florida Bar shall be to inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence.

In **The Florida Bar Re Schwarz,** 526 So.2d 56 (Fla. 1988) the Supreme Court held that activities of the Bar are limited to its stated purposes. The Court referred to the Judicial Council of Florida the question of the proper scope of legislative lobbying activities of the Bar. In its final report, the Council identified the following areas as being within the scope of the Bar's purpose:

(1) Questions concerning the regulation and discipline of attorneys;

(2) matters relating to the improvement of the functioning of the courts, judicial efficacy and efficiency;

(3) increasing the availability of legal services to society;

(4) regulation of attorneys' client trust accounts; and

(5) the education, ethics, competence, integrity and regulation as a body, of the legal profession.

In **The Florida Bar Re Schwarz,** 552 So.2d 1094 (Fla. 1989), the Supreme Court adopted the recommendations of the Judicial Council as guidelines to be followed with respect to determining the scope of permissible lobbying activities. While the Council's focus was on lobbying, its conclusions were based upon an analysis of the permissible scope of the Bar's political and ideological activities in light of its stated purpose. It appears clear to me that the Bar is limited in all of its political and

ideological activities to its stated purpose as further delineated by the Council's guidelines. I cannot see how a boycott to further general social causes, regardless of how well intended, can fit within the narrow stated purposes of the Bar.

In addition to the restrictions imposed by the Florida Supreme Court, the Bar is limited in its activities by Federal Constitutional restraints. In the recent case of **Keller v. State Bar of California,** 58 LW 4661 (June 4, 1990), the United States Supreme Court announced First Amendment restrictions on the use of compulsory bar dues for political or ideological purposes. The decision was not limited to legislative activities. The Court noted that the California Bar "lobbied the Legislature and other governmental agencies, filed amicus curiae briefs in pending cases, held an annual conference of delegates at which issues of current interest are debated and resolutions approved, and engaged in a variety of education programs." The petitioners had alleged that through such activities the Bar had used compulsory dues "to advance political and ideological causes". The Court held that a bar cannot spend compulsory dues over a member's objections for ideological activities not germane to the purpose for which compelled association is justified. The Court found that purpose to be "regulating the legal profession and improving the quality of legal services."

Earlier, in **Gibson v. The Florida Bar,** 798 F.2d 1564 (11th Cir. 1986), the United States Court of Appeals for the Eleventh Circuit provided more specific guidelines. The Court held that acceptable areas of ideological activity by The Florida Bar include "(1) questions concerning the regulation of attorneys; (2) budget appropriations for the judiciary and legal aid; (3) proposed changes in litigation procedures; (4) regulation of attorneys' client trust accounts; and (5) law school and Bar admission standards." Neither the Eleventh Circuit in **Gibson,** nor the Florida Supreme Court in **Schwarz** indicated that the examples given were intended to be all-inclusive. However, both opinions made clear that the examples were intended to illustrate the nature of subjects which define the parameters of permissible Bar activity.

The essence of all the foregoing cases is that The Florida Bar is not a general social action association with the freedom to engage in any activity it chooses. There are voluntary bar associations at the local and national levels which do have that freedom. The Florida Bar does not. It derives its power to compel membership from a very circumscribed purpose and it is limited in its pursuits to fulfilling that purpose.

I do not mean to suggest that the bar is powerless to deal with ethnic abuses of or by its members. It certainly has the power to respond to such abuses when they are sufficiently connected with the Bar's core purposes. Thus, the Bar can take action to correct such abuses if they occur internally or within the judicial system. I believe it would even be permissible, for example, to decline to hold a meeting at a particular establishment if it exercised policies that restricted the ability of certain members to attend and participate in the Bar activity of such establishment, whether such policies were motivated by ethnic prejudice or otherwise. The Bar simply cannot adopt policies designed to further general social causes not reasonably related to its essential purposes.

Sincerely,

/s/
Barry Richard

BSR/FLBAR:cjm(FlBar-A)

APPENDIX E

LEGISLATIVE LOBBYING RULES AS PROMULGATED BY THE SUPREME COURT OF FLORIDA, EFFECTIVE MARCH 26, 1991

Florida Bar Re Petition to Amend Rules Regulating The Florida Bar - Bylaws 2-3.10 and 2-9.3, No. 77,656
(Fla. March 26, 1991)

[Italicized text represents new rule amendments; text struck through represents original text to show deletions]

2-3.10 Meetings.

The board of governors shall hold six (6) regular meetings each year, at least one of which shall be held at The Florida Bar Center. Subject to the approval of the board of governors, the places and times of such meetings shall be determined by the president, who may make such designation while president-elect. Special meetings shall be held at the direction of the executive committee or the board of governors. Any member of The Florida Bar in good standing may attend meetings at any time except during such times as the board shall be in executive session concerning disciplinary matters, personnel matters, *member objections to legislative positions of The Florida Bar,* or receiving attorney-client advice. Minutes of all meetings shall be kept by the executive director.

2-9.3 Legislative policies.

(a) The board of governors shall adopt and may repeal or amend rules of procedure governing the legislative activities of The Florida Bar in the same manner as provided in rule 2-9.2; provided, however, that the adoption of any legislative position shall require the affirmative vote of two-thirds of those present at any regular meeting of the board of governors or two-thirds of the executive committee or by the president, as provided in the rules of procedure governing legislative activities.

(b) Publication of legislative positions. The Florida Bar shall publish notice of adoption of legislative positions in The Florida Bar News, in the issue immediately following the Board meeting at which the positions were adopted.

(c) Objection to legislative positions of The Florida Bar. Any active member of The Florida Bar may, within forty-five (45) days of the date of publication of notice of adoption of a legislative position, file with the executive director a written

objection to a particular position on a legislative issue. *The identity of an objecting member shall be confidential unless made public by The Florida Bar or any arbitration panel constituted under these rules upon specific request or waiver of the objecting member.* Failure to object within this time period shall constitute a waiver of any right to object to the particular legislative issue.

(1) After a written objection has been received, the executive director shall promptly determine the pro rata amount of the objecting member's dues at issue and such amount shall be placed in escrow pending determination of the merits of the objection. The escrow figure shall be independently verified by a certified public accountant.

(2) Upon the deadline for receipt of written objections, the board of governors shall have forty-five (45) days in which to decide whether to give a pro rata refund to the objecting member(s) or to refer the action to arbitration.

(3) In the event the Board of Governors orders a refund, the objecting member's right to such refund shall immediately vest although the pro rata amount of the objecting member's dues at issue shall remain in escrow for the duration of the fiscal year and until the conclusion of The Florida Bar's annual audit as provided in rule 2-6.16, which shall include final independant verification of the appropriate refund payable. The Florida Bar shall thereafter pay such refund within thirty (30) days of independent verification of the amount of refund, together with interest calculated at the statutory rate of interest on judgments as of the date the objecting member's dues at issue were received by The Florida Bar, for the period commencing with such date of receipt of the dues and ending on the date of payment of the refund by The Florida Bar.

(d) Composition of arbitration panel. Objections to legislative positions of The Florida Bar may be referred by the board of governors to an arbitration panel comprised of three (3) members of The Florida Bar, to be constituted as soon as

practicable following the decision by the board of governors that a matter shall be referred to arbitration.

The objecting member(s) shall be allowed to choose one member of the arbitration panel, The Florida Bar shall appoint the second panel member, and those two (2) members shall choose a third member of the panel who shall serve as chairman. In the event the two (2) members of the panel are unable to agree on a third member, the chief judge of the Second Judicial Circuit of Florida shall appoint the third member of the panel.

(e) Procedures for arbitration panel. Upon a decision by the Board of Governors that the matter shall be referred to arbitration, The Florida Bar shall promptly prepare a written response to the objection and serve a copy on the objecting member(s). Such response and objection shall be forwarded to the arbitration panel as soon as the panel is properly constituted. *Venue for any arbitration proceedings conducted pursuant to this rule shall be in Leon County, Florida, however, for the convenience of the parties or witnesses or in the interest of justice, the proceedings may be transferred upon a majority vote of the arbitration panel. The chairman of the arbitration panel shall determine the time, date and place of any proceeding and shall provide notice thereof to all parties.* The arbitration panel shall thereafter confer and decide whether *The Florida Bar proved by the greater weight of evidence that* the legislative matters at issue are constitutionally appropriate for funding from mandatory Florida Bar dues.

(1) The scope of the arbitration panel's review shall be to determine solely whether the legislative matters at issue are within those acceptable activities for which compulsory dues may be used under applicable constitutional law.

(2) The proceedings of the arbitration panel shall be informal in nature and shall not be bound by the rules of evidence. *If requested by an objecting member who is a party to such proceedings, such party and counsel, and any witnesses may participate telephonically, the expense of which shall be advanced by the requesting party.* The decision of the arbitration panel shall

be binding as to the objecting member(s) and The Florida Bar. If the arbitration panel concludes the legislative matters at issue are appropriately funded from mandatory dues, there shall be no refund and The Florida Bar shall be free to expend the objecting member's pro rata amount of dues held in escrow. If the arbitration panel determines the legislative matters at issue are inappropriately funded from mandatory dues, the panel shall order a refund of the pro rata amount of dues to the objecting member(s).

(3) The arbitration panel shall thereafter render a final written report to the objecting member(s) and the Board of Governors within forty-five (45) days of its constitution.

(4) In the event the arbitration panel orders a refund, *the objecting member's right to such refund shall immediately vest although the pro rata amount of the objecting member's dues at issue shall remain in escrow until paid. Within thirty (30) days of independent verification of the amount of refund,* The Florida Bar shall provide such refund ~~within thirty (30) days of~~ together with interest calculated at the ~~legal~~ *statutory* rate of interest *on judgments* as of the date the ~~written objection was~~ *objecting member's dues at issue were* received by The Florida Bar, *for the period commencing with such date of receipt of the dues and ending on the date of payment of the refund by The Florida Bar.*

(5) Each arbitrator shall be compensated at an hourly rate equal to that of a circuit court judge based on services performed as an arbitrator pursuant to this rule.

(6) The arbitration panel shall tax all legal costs and charges of any arbitration proceeding conducted pursuant to this rule, to include arbitrator expenses and compensation, in favor of the prevailing party and against the nonprevailing party. When there is more than one party on one or both sides of an action, the arbitration panel shall tax such costs and charges against nonprevailing parties as it may deem equitable and fair.

(7) Payment by The Florida Bar of the costs of any arbitration proceeding conducted pursuant to this Rule [sic], net of costs taxed and collected, shall not be considered to be an expense for legislative activities, in calculating dues refunds pursuant to this rule.